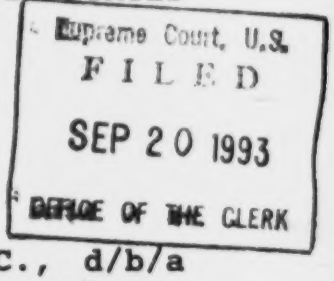
No. 93-440

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993



CAROL H. WILLIS, PETITIONER

v.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital, **RESPONDENTS**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an entity, which is created solely for the purpose of managing a county hospital leased from the county hospital authority, which is afforded every possible benefit bestowed on the hospital authority and which is in fact indistinguishable from the county hospital authority, can avoid liability under 42 U.S.C. §1983 by claiming to be private?

2. Whether, if such an entity is deemed private, a determination of state action should be made based upon the "symbiotic relationship" test of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) rather than the "nexus/joint action," "public function" and "state compulsion" tests set forth in Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), Lugar v. Edmondson Oil Company, 457 U.S. 922

(1982), Rendell-Baker v. Kohn, 457 U.S. 830 (1982) and Blum v. Yaretsky, 457 U.S. 991 (1982)?

3. Whether, if the "nexus/joint action" test applies, an entity managing a county hospital authority is a state actor, in light of the conflict on this point between several Circuits?

4. Whether, if the "public function" test applies, an entity which performs the obligations of a county hospital authority meets that test?

5. Whether, if the "state compulsion" test applies, an entity which shares its president and other board members with a county hospital authority can be deemed a state actor because of this overlapping authority?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case. Carol H. Willis, the sole Petitioner in this case, is an individual and therefore certifies, pursuant to Rule 29.1 of this Court's Rules, that no corporation, either parent or subsidiary, is a Petitioner.

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UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Service for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital, **RESPONDENTS.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Carol H. Willis respectfully petitions this Court for a writ of certiorari for review of the judgment and opinion of the United States Court of

Appeals for the Eleventh Circuit, entered in the above-styled proceeding on June 22, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 993 F.2d 837 (11th Cir. 1993) and is reprinted in the attached Appendix. (App. A, *infra*, 1a - 19a). The judgment of the Court of Appeals, entered June 22, 1993, is also reprinted in the Appendix. (App. B, *infra*, 20a - 21a).

The order of the United States District Court for the Southern District of Georgia (Bowen, D. J.) is reported at 804 F.Supp. 1557 (S.D.Ga. 1992); that order and judgment are reprinted in the attached Appendix. (App. C and D respectively, *infra*, 22a - 39a).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, Petitioner Carol H. Willis ("Petitioner") brought this action in the United States District Court for the Middle District of Georgia. On July 27, 1992, the District Court granted Respondents' Motion for Summary Judgment and entered judgment in favor of Respondents on July 28, 1992. (App. C and D, *infra*, 22a - 39a).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On June 22, 1993, the Eleventh Circuit entered an order affirming the District Court opinion. (App. A, infra, 19a). Petitioner did not seek a rehearing.

This Court has jurisdiction to review the judgment of the Eleventh Circuit

pursuant to 28 U.S.C. § 1254(1)(Supp. 1993).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner is a registered nurse who was employed by University Hospital in Augusta, Georgia from December, 1987 through January 2, 1990, when she was terminated. On December 28, 1990,

Petitioner brought this action under 42 U.S.C. § 1983 for violation of her rights under the First and Fourteenth Amendments.

Throughout her tenure at University Hospital, Petitioner consistently received excellent annual performance evaluations and merit raises based on those evaluations. In late 1989, Petitioner, who also was a private instructor in the Bradley childbirth method, wrote a letter to the editor of The *Augusta Chronicle* expressing her views regarding obstetrical practices. The letter was signed by Petitioner but did not identify her as a nurse or as being affiliated with University Hospital nor did the letter contain names of doctors or hospitals.

The *Augusta Chronicle* published Petitioner's letter on the morning of October 12, 1989. That same morning, Petitioner received a telephone call from

her supervisor, Respondent Hicks, who inquired whether Petitioner was the writer of the letter. When Petitioner responded affirmatively, Respondent Hicks instructed Petitioner to appear for a meeting regarding the letter on Petitioner's next scheduled work day.

Meanwhile, Respondent Hicks advised her acting supervisor, Jim Showman, that Petitioner was the letter writer. In turn, Showman informed Respondent Herzberg, University Hospital's personnel director, that the letter had been written by a staff nurse and that there was a "concern" on the part of the nursing and physician staff regarding the content of the letter. Showman and Respondent Herzberg discussed the content of the letter, Petitioner's right to free speech and her judgment and intent in writing the letter. Showman and Respondent Herzberg

then discussed what further action should be taken and specifically discussed termination of Petitioner for the expression of her views in this manner.

When Petitioner arrived at the hospital on her next scheduled day of work, she was ushered into a meeting with Showman and Respondents Hicks and Goforth, the director of maternal/childbirth nursing. Showman, Hicks and Goforth asked Petitioner what her intent had been in writing the letter and told her there were "proper channels" available at the hospital to express these views and effect change.

Showman mentioned the possibility of termination and warned Petitioner that Georgia is an employment at will state. Respondent Hicks told Petitioner not to report for work that day, then prepared a Special Interview Record, recording the

reprimand and her concerns over the content of the letter to the editor.

On January 2, 1990, when Petitioner reported for her scheduled shift, Respondent Hicks summoned her to a meeting with Respondent Goforth. Petitioner was terminated, effective immediately and advised that the reason for her termination was "loss of confidence due to poor judgment."

Petitioner appealed her termination through the hospital's grievance procedure. Throughout this process, each administrator who reviewed the termination confirmed that the basis for Petitioner's termination was her expression of opinions and philosophies different from those of the hospital.

At the grievance hearing, the final step in the grievance process, Petitioner was allowed to present evidence, but was

not allowed to hear any of the witnesses or evidence against her. After the grievance procedure concluded, Petitioner learned that she would not be reinstated.

Petitioner filed suit against Respondents pursuant to 42 U.S.C. § 1983, alleging violation of her constitutional rights to free speech and due process under the First and Fourteenth Amendments to the United States Constitution. After suit was filed, Respondents gave a variety of explanations for her termination, including "acts of insubordination against doctors and other nurses," "frequent statements evidencing unwillingness to function as a member of the University Hospital nursing team," and "poor judgment with respect to the manner, method and timing of her expressions of disagreement." Each of these reasons is nothing but a pretext for the actual

reason for her discharge, namely, retaliation for her expression of her philosophy and her views in favor of educating pregnant women and assisting them to give birth. Respondents admitted in briefs below that the true source of their dissatisfaction with Petitioner arose from her "strongly held beliefs in the Bradley natural childbirth techniques." According to Respondents, Petitioner's "beliefs" were at odds with those of University Hospital.

Asserting that Petitioner's termination was the result of the expression of her views, a position totally refuted by the facts and one apparently rejected by the Court of Appeals,[1] Respondents denied any

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[1] In its findings of fact, the Court of Appeals found: "On January 2, 1990, after reading the article, UHS officials fired Willis because of 'loss of confidence due to poor judgment.'" (App. A, *infra*, 3a (emphasis added).

liability under 42 U.S.C. § 1983, contending that there was no state action in Petitioner's termination. According to Respondents, Petitioner's termination was effected by a private, nonprofit corporation, Respondent UHS, and its employees. The District Court and Court of Appeals erroneously agreed with Respondents' contention, finding that there was no state action involved in Petitioner's termination. That conclusion ignores the unique nature of the relationship between UHS, a corporation created by Richmond County Hospital Authority ("RCHA") to lease and operate its public hospital, and RCHA, which is clearly a public entity. UHS is, for all intents and purposes, RCHA; at the very least, UHS and RCHA are so intertwined that the actions of UHS can fairly be attributed to RCHA.

The University Hospital facility was built in 1970 with public funds. In 1984, RCHA decided to create a private, non-profit corporation, UHS, to lease and operate University Hospital. The purpose of this restructuring was to benefit the public by allowing University Hospital to compete outside the borders of Richmond County. UHS, which did not exist prior to the restructuring, was created solely for the purpose of operating University Hospital pursuant to a Lease. On December 13, 1984, RCHA leased its entire facilities and operation to UHS for 40 years for the sum of only $1.00. At the termination of this 40 year Lease, all prelease assets and all additional assets acquired during the lease term will revert to RCHA.

RCHA owns all the buildings and land upon which University Hospital is located.

RCHA's only function is to assist and oversee the hospital, as set forth in the Lease and Amendments. Under the terms of the Lease, UHS is authorized to bring and defend lawsuits either in its own name or in the name of or on behalf of RCHA, to enforce indigent care contracts in the name of RCHA and to institute legal action on behalf of RCHA. The Lease requires RCHA, upon request by UHS, to exercise its powers of eminent domain to acquire property necessary for Richmond County's health care needs.

Under the Lease, RCHA retains oversight responsibilities pertaining to UHS. UHS is required to disclose information to RCHA so that RCHA can carry out these oversight responsibilities.

One man, Donald Bray, serves both as President and Chief Executive Officer of UHS and as President of RCHA. Of the

eleven members of the UHS board of trustees, four are also members of RCHA. The Lease and the UHS Bylaws require at least three members of the UHS board of trustees to be members of RCHA.

The Lease requires UHS to provide RCHA with facilities and support staff services, which UHS does. RCHA has no facilities or secretarial staff other than the UHS facilities and secretarial staff. Both UHS and RCHA have the same mailing address, telephone number and physical office.

In addition, RCHA appoints all UHS trustees, including the medical staff member of the UHS board of trustees. RCHA has no business which is not conducted by and through the office of Bray, President and Chief Executive Officer of UHS and President of RCHA.

RCHA and UHS hold joint quarterly meetings at which UHS trustees and RCHA members meet together and conduct the business of both UHS and RCHA at the same time and in the same room. Other than these combined quarterly meetings with UHS, RCHA holds no other meetings.

Under the terms of the Lease, UHS must provide its annual audit both to the Richmond County Commission and to RCHA. Likewise, RCHA provides its annual audit both to the Richmond County Commission and to UHS.

RCHA and UHS share the same attorneys and accountants. Certain hospital licenses and permits, including the clinical laboratory license and hospital laboratory permit, are still issued in the name of RCHA, even after the restructuring and incorporation of UHS. Six years after the restructuring, in its December 6, 1990

request for Medicare/Medicaid Certification, UHS described itself not as a private corporation, but as a hospital authority. RCHA is also the loss payee on property insurance maintained by UHS as the insured.

Unlike other private corporations, RCHA is publicly accountable. The original Lease was first amended on March 28, 1985 to ensure that the operations of University Hospital would continue to be publicly accountable as they had been under RCHA. These amendments included a requirement that the UHS board of trustees conduct open meetings and furnish RCHA and the public with annual financial and operating statements.

In response to continued charges by the Richmond County Commission that the restructuring would remove University Hospital from public scrutiny and account-

ability, RCHA and UHS again amended the Lease so as to (1) extend the open meetings requirement to UHS' five affiliated corporations; and (2) bring UHS under the Georgia Open Records Act. Accordingly, all documents of UHS, an allegedly private corporation, are open records; all meetings are public meetings.

Furthermore, UHS has a public purpose and exists to serve the public. The purpose of UHS, as stated in its Bylaws, is to provide health care for the benefit of the public. Bray, UHS' President and CEO, testified that UHS has no business other than providing health care for the public benefit. Under the Lease, UHS is required to and does provide indigent care to the public on behalf of Richmond County Commission and RCHA.

Finally, UHS receives public financial benefits to which RCHA is entitled. The

Lease requires RCHA, on request, to issue revenue anticipation certificates to UHS. UHS receives public funds from revenue anticipation certificates issued by RCHA. In addition, UHS receives $4.4 million in public funds from the Richmond County Commission annually for indigent care. UHS also receives $800,000.00 in public funds from RCHA annually to operate its ambulance service. These funds flow from the Richmond County Commission through RCHA, directly to UHS.

These facts show that UHS is the alter ego of RCHA. At the very least, they demonstrate that the operations of RCHA and UHS are so closely intertwined as to make all actions of UHS the actions of RCHA.

Furthermore, RCHA itself was involved in Petitioner's termination in two ways: (1) through its President, Bray; and (2)

through its grievance procedure. Beginning shortly after Petitioner's letter to the editor appeared in print, Bray was kept apprised of the circumstances which ostensibly led to Petitioner's firing. Bray had discussions with Respondents Herzberg and Bowcutt and with other hospital officials regarding Petitioner and her letter to the editor prior to her termination. After Petitioner's termination, Bray, President of RCHA, served as one of five members of the grievance committee which reviewed and affirmed Petitioner's termination.

The grievance procedure in effect at the time of Petitioner's firing was RCHA's grievance procedure. This procedure was prepared by RCHA on June 1, 1975, prior to the restructuring and incorporation of UHS. UHS continued following this same

grievance procedure after UHS began leasing the hospital.

Despite all of these facts showing the inseparability of RCHA and UHS and RCHA's involvement in the termination of Petitioner, Respondents asserted that there was no state action and moved for summary judgment. The District Court erroneously concluded that there was no state action in Respondents' termination of Petitioner. (App. C, *infra*, 36a). The District Court rejected the argument that UHS and RCHA are one and the same. According to the District Court, UHS is a private actor who can only be charged with state action when the state plays a role in the particular conduct at issue. (App. C, *infra*, 36a).

Relying on *Greco v. Orange Memorial Hospital Corporation*, 513 F.2d 873 (5th Cir. 1975) *cert. denied*, 423 U.S. 1000

(1975), the District Court found that because the Lease purported to give UHS exclusive control over personnel management, there could be no state action. The District Court, also relying on its opinion in a previous termination case brought by a University Hospital employee,[2] concluded that (1) there was no sufficient nexus between the state and the decision to terminate Petitioner; (2) there was no state coercion or encouragement of the termination; and (3) UHS, a private hospital corporation did not exercise powers "traditionally reserved exclusively to the state." (App. C, *infra*, 36a).

Petitioner appealed the District Court's order to the Court of Appeals for

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[2] *Coleman v. University Hosp.*, No. CV 187-117 (S.D.Ga. April 28, 1988). In *Coleman*, the *pro se* plaintiff pointed to only one indicia of state involvement: the receipt of federal funds.

the Eleventh Circuit, invoking the appellate court's jurisdiction under 28 U.S.C. § 1291 to review final decisions of the district courts. In its opinion, the Court of Appeals appeared to conclude that while Petitioner was terminated for expressing her views (App. A, *infra*, 3a), there was no state action under 42 U.S.C. § 1983. The Court of Appeals held that Petitioner failed to show state action under either the public function test or the state compulsion test. According to the Court of Appeals, the only test which was applicable was the "nexus/joint action" test. Relying exclusively upon *Greco*, a former Fifth Circuit case, the Court of Appeals found that no state action existed and affirmed the District Court's grant of summary judgment to Respondents. (App. A, *infra*, 1a). The Court of Appeals did note, however, that

Petitioner had cited persuasive conflicting authority from another circuit, *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987). (App. A, *infra*, 13a).

REASONS FOR GRANTING THE PETITION

This case illustrates one of the perils of privatization of governmental functions. By creating a private corporation, leasing that corporation and all of its assets to the corporation for 40 years for the sum of one dollar, insisting that the corporation function as a government entity, bestowing all of the benefits of being public upon it, and in fact, operating through the corporation, RCHA has effectively retained all the benefits of being a government entity. However, by virtue of the Court of Appeals' decision, RCHA has managed to escape the burdens of

being a government entity by escaping liability for constitutional violations under 42 U.S.C. § 1983.

The tests generally used to determine whether the conduct of a purely private actor may be attributed to the state should not come into play in the instant case because it is clear that the public hospital authority and the allegedly private corporation are one and the same. Instead, the Court of Appeals should have applied the symbiotic relationship test of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to find state action. Like the instant case, *Burton* involved a lease of public property to a private entity. This Court examined the entire set of circumstances surrounding the relationship to determine that state action was present. *Burton*, 365 U.S. at 722. Even though the state was not

directly involved in the challenged action, this Court found the overall relationship between the public and private entities constituted state action. The decision of the Court of Appeals completely ignores the *Burton* analysis, despite its clear applicability.

Instead, the Court of Appeals focuses on three tests for state action: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. (App. A, *infra*, 11a). Petitioner urges this Court that the correct test to be applied is that of *Burton* because of the identical relationship between the public and private actions in that case and the one at hand. *See* Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 F.S.U.L.Rev. 893, 901 n. 48 (1984).

However, to the extent that the Court is inclined to follow the three tests set forth above, Petitioner implores the Court to review the Court of Appeals' application of these tests in light of the facts of this case and the conflicting decisions of other Circuits. If Petitioner's case does not involve state action, it is difficult to imagine any case in which an entity claiming non-governmental status will ever be subject to § 1983 restrictions, regardless of the true nature of the entity. What is not difficult to imagine is the vast number of governmental entities, including public universities and school systems, which will create ostensibly private entities to retain all of the benefits of being public while avoiding all the burdens attendant to public status. Such a trend would eviscerate the purposes behind § 1983.

I.

The Court of Appeals erred in allowing UHS to escape liability under 42 U.S.C. § 1983 when UHS is simply the alter ego of RCHA and thus necessarily a state actor.

The Court of Appeals held that UHS cannot be liable under § 1983 because it is a private nonprofit corporation and therefore cannot act "under color of state law" as required for a § 1983 action. While RCHA may have set UHS up as a private entity, the evidence in the record clearly shows that UHS is the alter ego of RCHA, an entity indisputably subject to liability under § 1983. *Wofford v. Glynn Brunswick Mem. Hosp.*, 864 F.2d 117, 118 (11th Cir. 1989); *Richards v. Emanuel County Hosp. Auth.*, 603 F. Supp. 81, 83

(S.D.Ga. 1984). As such, UHS cannot avoid § 1983 liability.

Binding precedent in the Eleventh Circuit provides that state action may be founded on an alter ego theory. In *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), the former Fifth Circuit[3] considered a § 1983 action in which a county leased space in its courthouse to a private entity, which in turn operated a restaurant that refused to serve blacks. The court held that in rendering a service for the benefit of the persons having to use the courthouse, "the lessee stands in the place of the county. His conduct is as much state action as would be the conduct of the county itself."

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1984) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down on or before September 30, 1981.

Derrington, 240 F.2d at 925-26. Likewise, in the instant case, the lessee, UHS, stands in the place of RCHA in operating University Hospital. Thus, its actions with respect to Petitioner's termination were RCHA's actions.

Both the Court of Appeals and the District Court apparently rejected the alter ego theory, based on *Richmond County Hospital Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562 (1985). However, that case involved only the restructuring of University Hospital, and the Georgia Supreme Court's consideration of the separate nature of UHS and RCHA was limited to whether UHS and RCHA were sufficiently separate entities under the Hospital Authority Act, O.C.G.A. § 31-7-1 *et seq.*, so as to allow the restructuring. *Richmond County Hospital Authority v. Richmond County*, 255 Ga. at 185-86, 336

S.E.2d at 565. The Georgia Supreme Court never considered whether UHS and RCHA were alter egos for purposes of establishing state action under § 1983, nor is there any basis for suggesting that the Georgia Supreme Court intended the case to support evisceration of § 1983 liability.

In fact, UHS meets the requirements for establishing alter ego under Georgia law. In *Farmers Warehouse of Pelham, Inc. v. Collins*, 220 Ga. 141, 137 S.E.2d 619 (1964), the Georgia Supreme Court enunciated the rule for disregarding a corporate entity and recognizing its true identity as the alter ego of individuals or another entity:

> [T]o establish the alter-ego doctrine, it must be shown that [1] the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; [2] that there is such unity of interest and ownership that the separate personalities of the corporation and owners no longer exist; and [3] to adhere to the doctrine of

> corporate entity would promote injustice or protect fraud.

Farmers Warehouse, 220 Ga. at 150, 137 S.E.2d at 625 (quoting *Fletcher Cyclopedia Corporations*, Vol. 1, § 41.1, p. 169). *See also Federal Deposit Ins. Corp. v. United States*, 654 F. Supp. 794, 809-10 (N.D. Ga. 1986); *Southern Envt'l Group, Inc. v. Rosebud Landscape Gardening, Inc.*, 196 Ga. App. 392, 394, 395 S.E.2d 913, 915 (1990); *Sheppard v. Tribble Heating & Air Conditioning, Inc.*, 163 Ga. App. 732, 733, 294 S.E.2d 572, 573 (1982).

All three requirements are met in the instant case. First, UHS is clearly "a mere instrumentality for the transaction of [RCHA's] affairs." UHS did not exist before RCHA's restructuring in 1985. After the restructuring, RCHA continued to operate its affairs through the newly-created UHS. The President and Chief

Executive Officer of UHS Donald Bray is also the President of RCHA. RCHA board meetings are conducted in rooms supplied by UHS concurrently with UHS board meetings. All necessary facilities and administrative support for RCHA is provided by UHS. RCHA uses UHS' mailing address and telephone number. All RCHA minutes are kept and transcribed by UHS staff. RCHA notices are sent out by UHS. Bray testified unequivocally that there is no RCHA business which is not conducted through his UHS office.

The second element of the *Farmers Warehouse* test is also met; "unity of interest and ownership" could hardly be stronger than in the instant case. Bray stated that the purpose of UHS is to serve the public. As a public hospital authority, RCHA's interest and purpose is the same. While legal title to University

Hospital is in RCHA, the overall arrangement between RCHA and UHS suggests the "unity of ownership" described in *Farmers Warehouse*. RCHA leased the assets of University Hospital to UHS for $1.00. Since the execution of the Lease, UHS has added new assets including a paraprofessional building, a parking deck, a new laundry and has added two nursing homes. At the end of the Lease, these and all other assets will revert to RCHA.

Hospital permits and licenses obtained by UHS also reflect the commonality of interest and ownership. Since the restructuring, several permits have been issued jointly to University Hospital and RCHA. A request for medicaid/medicare certification made by Bray's office in 1990, almost six years after the Lease was signed, states that University Hospital is

a hospital authority rather than a private corporation.

Other indicia of common interest and ownership include the requirement that UHS provide RCHA with financial statements and periodic operating reports. Annual audits of RCHA and UHS must be reported to each other and to the Richmond County Commission. UHS pays the cost of RCHA's audit as well as its own.

Under the Lease, RCHA retains oversight responsibilities in connection with UHS' operation of University Hospital. In addition, UHS must provide indigent care and ambulance service on behalf of RCHA. RCHA pays UHS for these services with public funds it receives from the Richmond County Commission. In summary, the interests and ownership rights of UHS are those of RCHA.

The third and final requirement of the *Farmers Warehouse* test requires a finding that "to adhere to the doctrine of corporate entity would promote injustice or protect fraud." *Farmers Warehouse*, 220 Ga. at 150, 137 S.E.2d at 625. In *Hickman v. Hyzer*, 261 Ga. 38, 401 S.E.2d 738 (1991), the Georgia Supreme Court recently reaffirmed this requirement, holding that it would "disregard the separateness of the corporate entity where the corporation has overextended its privileges in the use of the corporate entity to defeat justice, to perpetrate fraud or to evade statutory, contractual or tort responsibility." *Hickman*, 261 Ga. at 39, 401 S.E.2d at 739.

In the instant case, UHS is attempting to use its corporate status to evade its statutory responsibility under § 1983. The Fifth and Tenth Circuits have both considered the precise issue of such an

evasion by a private entity which leases and operates a public hospital; in both cases, the courts held that the defendants could not escape § 1983 liability. *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988); *Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214 (5th Cir. 1987). In the first case, *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, the Fifth Circuit considered the defendant's argument that the hospital authority had no control over daily operations and therefore could not be said to have had any involvement the termination of the plaintiff's staff privileges. *Jatoi*, 807 F.2d at 1221. Noting that the hospital authority was the lessor and monitored the activity of the private entity lessee, the court held: "The Authority cannot benefit from private management of the hospital and at the same

time insulate itself from liability for [a § 1983 violation] by that manager. The private defendants cannot receive public funds, utilize public facilities and serve a public purpose, yet insist that their private status forestalls any correction of a violation of the constitutional rights of their medical staff." *Jatoi*, 807 F.2d at 1221-22. The same factors relied upon by the *Jatoi* court are present in the instant case, as Respondent UHS receives public funds, utilizes public facilities and serves a public purpose. Thus, state action is present.

Citing *Jatoi*, the Tenth Circuit also refused to allow a private entity to escape § 1983 liability in *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988). In *Milo*, the hospital authority had contracted with a private entity for the day-to-day management of

the hospital. The court held: "The defendants cannot escape liability by delegating responsibility to another party." *Milo*, 861 F.2d at 1197. Similarly, RCHA's delegation of some authority to UHS cannot exempt Respondents from liability for violation of the Petitioner's constitutional right for free speech.

UHS is the alter ego of RCHA and therefore is necessarily a state actor. The Court of Appeals' decision ignores the controlling authority of *Derrington v. Plummer*, 240 F.2d 922 and allows a sham arrangement to eviscerate the mandate of 42 U.S.C. § 1983. The Court of Appeals has set dangerous precedent with its decision in the case at hand. As discussed briefly above and further below, the decision also directly conflicts with decisions of other Circuits. This Court

should grant certiorari to resolve the conflict.

II.

The Court of Appeals erred in failing to apply the symbiotic relationship test to Petitioner's case when *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) requires application of that test.

The Court of Appeals squarely ignored the holding in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) in reaching its decision in this case. *Burton* requires that, in a situation involving a lease between a public authority and a private entity, as here, a court should consider all aspects of the relationship between the public and private entities in determining whether

state action is present. *Burton*, 365 U.S. at 722.

Burton first addressed the prospect of a private entity's status as a § 1983 state actor. In *Burton*, a public authority leased a portion of public property to a private coffee shop. When the private entity refused the plaintiff service on the basis of his race, he filed a § 1983 action, asserting that the circumstances of the lease made the coffee shop a state actor.

This Court agreed with the *Burton* plaintiff. Initially, the Court noted the need for an *ad hoc* determination: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. The Court then considered the state's involvement, placing particular

emphasis on the following: (1) the public ownership of the land and building; (2) the building's dedication "to 'public uses' in performance of the Authority's 'essential government function'"; and (3) the mutual benefits of the lease to the Authority and the private entity. *Burton*, 365 U.S. at 723-24. This Court explained its finding of state action: "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged action, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment." *Burton*, 365 U.S. at 725.

Many of the factors on which the Supreme Court relied to find state action in *Burton* are also present in the instant case; certain of these factors are even

stronger in the instant case. In both cases, the lessor, a public authority, leased public property to a private entity. In the instant case, the private entity was created for the sole purpose of serving as the lessee. Both the *Burton* building and University Hospital are dedicated to "'public uses' in the performance of the Authority's 'essential government function.'" *Burton*, 365 U.S. at 723. Finally, in both cases, mutual benefits to the state and the private entity exist. In the instant case, the Lease benefits RCHA by allowing University Hospital to serve paying patients from outside Richmond County, thereby making the hospital more competitive in the marketplace. UHS benefits by having use of millions of dollars in public assets, including real estate.

In *Burton*, the Court also considered whether the specific action challenged benefitted both the state and the private entity and found that it did. The same is true in the case at hand. Respondents admit that the "plaintiff's strongly held beliefs in the Bradley Natural Childbirth techniques were at odds with University Hospital's policies, and such beliefs caused conflicts between plaintiff and other hospital nurses and personnel." If such were the case, then the Respondents' deprivation of the Petitioner's rights by terminating her certainly benefitted the Respondents in alleviating alleged conflict. Because of the intricate relationship between Respondent UHS and RCHA, including the fact that all assets will revert back to RCHA at the Lease's end, RCHA has every interest in ensuring

that all conflicts are resolved and the assets are preserved and increased.

III

The Court of Appeals' decision misapplies the tests for state action by an ostensibly private actor and demonstrates the need for clarification of these tests.

Although Petitioner asserts that the *Burton* symbiotic relationship test is the one applicable, as her case also involved the lease of public property to a private party, the Court of Appeals used three other tests and determined that under those tests, Petitioner failed to show state action. This decision misapplies the tests and demonstrates the need for this Court to clarify the application of these tests when a public authority leases

its property and delegates its function to a private entity.

After *Burton*, this Court addressed state action by private entities with some public connection. Notably, none of these cases involved a public authority lessor and private lessee, as in *Burton* and the case at hand. If, as the Court of Appeals holds, even cases like Petitioner's must meet one of three state action tests, this Court's guidance is needed to establish how these tests should be applied.

The development of three additional tests began in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974). The state action test in *Jackson* was phrased in terms of "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*,

419 U.S. at 351. While this Court found that state regulation of a utility did not constitute state action, the Court stated that the result might be different if a private entity exercised "powers traditionally reserved to the State." *Jackson*, 419 U.S. at 352. In the instant case, UHS provides indigent care and other services on behalf of the county hospital authority. Under Georgia law, "[e]very hospital authority shall be deemed to exercise public and essential government functions...." O.C.G.A. § 31-7-75 (1991). As UHS is, in effect, the Richmond County Hospital Authority and in fact often describes itself as a hospital authority, state action is demonstrated under *Jackson*.

After *Jackson*, this Court considered a trilogy of state action cases in 1982. In *Blum v. Yaretsky*, 457 U.S. 991 (1982),

this Court described three methods by which a plaintiff may show state action by a private entity: (1) a close nexus as described in *Jackson*; (2) state coercion or encouragement of the challenged action; or (3) a showing that the private entity exercises powers traditionally reserved exclusively to the state. *Blum*, 457 U.S. at 1004-05. These three tests are relied upon by the Court of Appeals in finding a lack of state action in the case at hand.

Another case in the trilogy, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), focused primarily on the third test, that of public function. In *Rendell-Baker*, the Court referenced the test for state action announced in the third case, *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). According to *Lugar*, a finding of state action is based on whether the "conduct allegedly causing deprivation of

a federal right [is] fairly attributable to the State." *Lugar*, 457 U.S. at 937. Recognizing that many tests had emerged, this Court stated, "Whether these different tests are actually different or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." *Lugar*, 457 U.S. at 939.

Although the *Lugar* court did not seek to resolve this question, the time for resolution has come. Depending upon the particular court, one, some or all of these tests are used to determine state action. As more and more government entities arrange for their functions to be managed by ostensibly private actors,[4] a

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[4] A 1982 survey showed that of 59 typically governmental services, 25% were performed by private entities; fully one quarter to one half of public hospital

(continued...)

coherent state action test for these situations is a necessity.

In his dissent in *Jackson v. Metropolitan Edison*, 419 U.S. 345, 360 (1974) (Douglas, J. dissenting), Justice Douglas concluded that the rule of *Burton* requires a consideration of the aggregate of relevant factors rather than the examination "seriatim of each of the factors upon which claimant relies and to dismiss each individually as being insufficient to support a finding of state action." Petitioner urges this Court that *Burton* is controlling under the facts of her case and so the proper test is that which examines the aggregate of relevant

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[4](...continued)
services were being performed by private contractors. Savas, *Privatization and Persons*, 40 Vand.L.Rev. 889, 890 (1987). In Georgia alone between 1987 and 1992, sixteen county hospital authorities turned over management to ostensibly private entities. *AHA Guide to Health Care*, 1987 and 1992 volumes.

factors. As shown above, such an examination leads inescapably to a finding of state action.

Assuming *arguendo* that this Court directs that each test be applied separately, there is still a need for this Court to determine the requirements to be met, particularly with respect to the nexus test. There is clear conflict in the Circuits with respect to the facts necessary to meet this test, especially in the context of a public hospital authority creating and contracting with a private entity for management services.

In Petitioner's case, the Court of Appeals relied exclusively upon *Greco v. Orange Memorial Hospital Corporation*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). The Court of Appeals concluded that because both *Greco* and the case at hand involved leases which re-

quired the private entity to report to the county, gave the private entity sole discretion in personnel matters and required the private entity to provide care to the general public, there was no state action.

Greco is not properly applied in the instant case. Conspicuously absent from *Greco* is the existence of the hospital authority which permeates the instant case. In *Greco*, the only two entities were the hospital and the county. *Greco*, 513 F.2d at 876. Certainly, it is much easier to presume that in such a situation, the county might lack the requisite control, as the county probably would not have direct supervision over every facility it operates.

In the instant case, there is a hospital authority, RCHA, which (1) created the corporation now leasing the

hospital; (2) shares offices and staff with that corporation; (3) shares board meetings and members with the corporation; and (4) has only one function: to oversee the operation of the hospital for county citizens. In *Greco*, these intricacies did not exist. However, the *Greco* court explicitly acknowledged *Burton's* conclusion that "'[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" *Greco*, 513 F.2d at 878 U.S. 715, 722 (1981). When the facts and circumstances are sifted and weighed in Petitioner's case, the state's involvement is obvious.

In further examining the relationship between the state actor and private corporation, the *Greco* court also emphasized the importance of "benefits mutually

conferred." *Greco*, 813 F.2d at 880. While in *Greco* the court found that the hospital's abortion policy conferred no benefit upon the county, the same cannot be said about the actions of UHS in the instant case. The Respondents admitted that they thought Petitioner's letter would cause conflict and that University Hospital benefitted when an employee was "loyal."

Because RCHA is indistinguishable from UHS or University Hospital, RCHA receives any benefit UHS or University Hospital receives. At the very least, because all of the assets of University Hospital, whether acquired before or after the Lease revert to RCHA at the end of the Lease, it certainly must be important to RCHA to have UHS do everything possible to benefit the hospital. In *Greco*, there was no such automatic reversion; instead, the private

corporation had the option to purchase the hospital. *Greco*, 513 F.2d at 876.

Another important connection which exists in the case at hand but is absent in *Greco* is the dual leadership, demonstrated in the instant case by the role played by Bray, the President and CEO of UHS and President of RCHA. Bray wears both hats, and as the facts make abundantly clear, neither is severable from the other. In *Greco*, this inseparable connection simply did not exist.

Finally, the *Greco* court found important the fact that the lease did not prohibit the activity complained of and therefore, the county retained no control over the lessee's policy regarding the activity. *Greco*, 513 F.2d at 881. However, in Petitioner's case, the Lease from RCHA to UHS does require that UHS comply with "all applicable rules, orders,

ordinances and regulations of the governmental authorities of the United States, State of Georgia, County of Richmond and City of Augusta, and all departments and subdivisions thereof." Certainly, the United States Constitution and the Civil Rights Act fit under this requirement.

For all these reasons, *Greco* does not control the instant case. Instead, Petitioner's case is controlled by a later Fifth circuit opinion, *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5th Cir. 1987) and by *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988). In *Jatoi*, the Fifth Circuit cited many factors supporting its finding of a sufficient nexus, including:

> (1) The hospital authority was created under statute;
>
> (2) The facility was publicly owned and constructed with public funds;
>
> (3) The authority turned the management of the hospital over to a

> new, nonprofit corporation set up for that purpose;
>
> (4) The corporation appointed the Board of Trustees;
>
> (5) The authority leased the hospital to the new corporation;
>
> (6) The corporation ran the day-to-day operations of the hospital; and
>
> (7) The corporation was required to submit financial information to the authority; and
>
> (8) The authority derived financial benefits from the lease arrangement.
>
> *Jatoi*, 807 F.2d at 1217, 1221. *See also Milo v. Cushing Memorial Hosp.*, 861 F.2d 1194 (10th Cir. 1988).

As outlined above, all these facts are present in the instant case as well.

In addition to providing a list of facts which show state action, the *Jatoi* court also explained why the tests from *Blum v. Yaretsky*, 457 U.S. 991 (1982), both relied upon by the District Court in the instant case, did not apply. First, the court noted that *Blum* did not involve

an institution which was publicly owned; there was never public ownership nor construction with public funds. *Jatoi*, 807 F.2d at 1221. Furthermore, the state did not gain financial benefit from the operation of the institution in *Blum*. *Jatoi*, 807 F.2d at 1221. Finally, the court placed particular emphasis on the fact that the private manager had taken over from the authority. *Jatoi*, 807 F.2d at 1221. *See also Schier v. Board of Trustees of Temple Univ.*, 576 F. Supp. 1569 (E. D. Pa. 1984) (distinguishing *Blum* on same grounds).

Like the Fifth Circuit, the Tenth Circuit has also consistently found state action when, as here, a public hospital authority contracts with a private entity to provide hospital management services. In *Milo v. Cushing Memorial Hospital*, 861 F.2d 1194 (10th Cir. 1988) the Tenth

Circuit cites many of the factors present in Petitioner's case as constituting a symbiotic relationship which made the termination of an employee state action. *Milo*, 861 F.2d at 1196. The Tenth Circuit recently reaffirmed its *Milo* decision in *Carnes v. Parker*, 922 F.2d 1506, 1509 (10th Cir. 1991), another case involving the termination of an employee by a private entity which had contracted with a public hospital authority to manage the county hospital.

The holdings in the instant case and *Greco* cannot be reconciled with the later Fifth Circuit opinion in *Jatoi* and the Tenth Circuit's decisions in *Milo* and *Carnes*. Certiorari should be granted so that there will be uniformity in decisions which involve virtually identical facts.

In reviewing the other two tests, that of public function and state compulsion,

the Court of Appeals concluded that those tests were not met in Petitioner's case. This conclusion is inconsistent with past applications of these tests under similar circumstances. Petitioner does meet the "public function" test. In *Rendell-Baker v. Kohn*, 437 U.S. 830 (1982), this Court described the test as "whether the function performed has been 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). *See also Jeffries v. Georgia Residential Finance Auth.*, 678 F.2d 919 (11th Cir. 1982). In the instant case, the function performed by University Hospital is to provide health care, including indigent care, to the public. In fact, Georgia law specifically provides that hospital authorities provide "public and essential government functions."

O.C.G.A. § 31-7-75 (1991). In his deposition testimony, Bray admitted that UHS and University Hospital have no business other than providing health care for the benefit of the public. It is indisputable that public health care has "traditionally [been] the exclusive prerogative of the State," as required by *Rendell-Baker*. In a footnote particularly applicable to the instant case, the *Rendell-Baker* Court suggested that while there was not a public function in that case, one might be found if there was evidence of a "sham arrangement" by which the State attempted to pass off public services as those of a private party. *Rendell-Baker*, 457 U.S. at 842, n. 7.

Petitioner is also able to meet the test of state action requiring coercion or significant involvement on the part of the state with regard to the challenged

action. First, as demonstrated above, UHS is the alter ego of RCHA. The connections between RCHA and UHS make it difficult to conceive how any decision of one is not the decision of the other, including the decision to terminate Willis. Thus, coercion or significant involvement in any decision in inevitable.

Even if the alter ego doctrine is not applied, the existence of state involvement in the decision to terminate Willis is clear. Bray, President of both RCHA and UHS, discussed Petitioner's termination with Respondents Herzberg and Bowcutt and with other University Hospital officials both before and after it occurred. Bray also served as a member of the grievance committee reviewing Petitioner's termination. In *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984), the Sixth Circuit, although declining to

recognize state action on the specific facts of *Crowder*, recognized: "Undoubtedly, there may be situations where state action is manifest in the decisions of a private entity because public officials work behind the scene to influence a particular result or because powerful and influential public officers add the prestige of their office to the actions or findings of a private institution." *Crowder*, 740 F.2d at 452. Along these lines, Bray's dual roles within RCHA and UHS make state action manifest.[5]

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[5] *Crowder* is also important to a determination of state action in the instant case for other reasons. Citing *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962) and *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), the *Crowder* court suggested that state action might be found if there were a reverter for improper use, as in *Hampton*, or tax exempt status or capital construction subsidies as in *Eaton*. The court reasoned that such evidence would show the "pervasive nature"

(continued...)

CONCLUSION

With the increasing trend toward privatization of governmental functions, the continued vitality of 42 U.S.C. § 1983 is severely threatened if, as here, government entities are allowed to retain all the benefits of being public but shed all the burdens of public status. There is little doubt that, unless this Court acts, government entities will seek to escape constitutional restraints in the fashion the Respondents have, and the mandate of 42 U.S.C. § 1983 will be eviscerated entirely. This Court should grant certiorari to prevent such a miscarriage of justice.

This Court's holding in *Burton v. Wilmington Parking Authority*, 365 U.S. 715

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[5](...continued)
of the state in the operation of the facility. As outlined in the Statement of the Case, all of these facts are present in the case at hand.

(1961) should control the instant case and lead to a finding of state action. If it does not, this Court should clarify which test should be applied and should resolve the conflict currently existing among the Circuits with respect to the nexus test, which was applied by the Court of Appeals in the case at hand.

Respectfully submitted.

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September 17, 1993

APPENDIX OF PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

NO. 92-8763

CAROL H. WILLIS,

PLAINTIFF-APPELLANT,

v.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital,

DEFENDANTS-APPELLEES.

Argued and Submitted March 31, 1993
Decided June 22, 1993

OPINION

HATCHETT, Circuit Judge:

In this appeal from the district court's entry of summary judgment for the appellee, we affirm the district court's ruling that a hospital's firing of the appellant did not constitute state action for 42 U.S.C. § 1983 purposes.

FACTS

University Health Services, Inc. (UHS), the appellee, is a private, nonprofit corporation that operates University Hospital pursuant to a lease agreement with the Richmond County Hospital Authority (RCHA), a public hospital authority. UHS employed Carol Willis, the appellant, as a registered nurse at University Hospital in Augusta, Georgia from December, 1987, until January 2, 1990. During 1989 and January, 1990, Willis also taught private childbirth education classes to prospective parents in Augusta, Georgia. In October, 1990, the

Augusta Chronicle published a letter Willis wrote to the editor, expressing her opinions on obstetrical practices.[1] On January 2, 1990, after reading the article, UHS officials fired Willis because of "loss of confidence due to poor

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[1] The text of the published letter entitled "Offers Criticisms of Doctors and Mothers" was as follows:

> Praise goes to the very few obstetricians in Augusta who realize an educated, aware, responsible woman is an easier patient and much less of a legal risk.
>
> Shame on the multitude of obstetricians who patronizingly tells moms (in words and actions) 'Don't worry about a thing, I'll take care of everything for you.' No wonder they get sued so often.
>
> Sympathy goes to the gullible moms whose babies 'sucked out, dragged out, or cut out' instead of them being assisted to 'give birth.'
>
> Pity on the baby who pays the price with the potential of his life.
>
> Forgive us, nature, for our lack of faith in you.

judgment."[2] University Hospital officials mailed a copy of UHS's grievance policy to Willis, and afforded her a full UHS grievance procedure hearing on August 17, 1990. After the five-hour hearing, the grievance committee upheld Willis's termination.

UHS operates University Hospital pursuant to a lease agreement with the RCHA. RCHA is a public hospital authority "created ... by resolution of the Board of Commissioners of Richmond County, pursuant to the Hospital Authorities Act...." *Richmond County Hosp. Authority v. Richmond County*, 255 Ga. 183, 336 S.E.2d 562, 563 (1985). Accordingly, RCHA's acts would be state acts for purposes of

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[2] Appellees Hicks, University Hospital Head Nurse; Goforth, University Hospital employee; Bowcutt, University Hospital assistant Administrator of Nursing Services; and Herzberg, University Hospital Director of Personnel Services; signed Willis's termination notice.

section 1983 liability. *See Wofford v. Glynn Brunswick Memorial Hosp.*, 864 F.2d 117, 118 (11th Cir. 1989) (finding that the hospital was a public hospital authority created under O.C.G.A. §§ 31-7-1 *et seq.*, and thus, its actions constituted state action under section 1983).

Willis contends that UHS and RCHA are so intertwined as to implicate state action. UHS contends, however, that UHS and RCHA have only a generalized relationship which is insufficient to establish state action. Both parties rely heavily upon the lease agreement and urge this court to concentrate on the lease agreement.

Willis highlights the following facts to show an intertwining relationship between UHS and RCHA: (1) UHS is a corporation created for the purpose of assuming the duties of RCHA; (2) RCHA

leased its facilities to UHS for forty years for only one dollar; (3) UHS may bring and defend lawsuits either in its own name or in the name or on behalf of RCHA; (4) UHS may enforce indigent care contracts in the name of RCHA; (5) RCHA must, upon request from UHS, exercise its power of eminent domain to acquire property for the purpose of providing for Richmond County's health care needs; (6) RCHA has four members who serve on the UHS board of trustees; (7) UHS must provide RCHA with facilities and support staff services; (8) UHS and RCHA share the same address, telephone number, and physical office; (9) RCHA appoints the UHS trustees and the medical staff board member from UHS' nominations; (10) UHS and RCHA share the same attorneys and accountants and report the accountants' annual audit to each other; (11) UHS must comply with the

Georgia Open Records Act; and (12) UHS has a public purpose and exists to serve the public.

On the other hand, UHS highlights the following facts to establish that UHS and RCHA are distinct entities: (1) UHS assumed control of the hospital so that it could be competitive outside of Richmond County; (2) University Health, Inc. is the parent corporation for UHS and other services; (3) UHS has entered a joint venture with a local hospital to develop other care facilities; (4) UHS has broad discretion to diminish, curtail, or cease services to promote the public health needs of the community; (5) UHS is authorized to "augment, improve or increase any existing service or add any service or shift current or new services to another facility"; (6) UHS has authority to determine whether

acquisition, construction, or improvement of hospital facilities is necessary; (7) UHS has sole authority to repair or replace any of its assets; (8) UHS may obtain insurance policies payable solely to UHS; (9) UHS has the authority to enforce rules and regulations regarding safety and care; and (10) UHS controls the daily operations and management of the hospital.

PROCEDURAL HISTORY

On December 28, 1990, Willis filed this lawsuit in the United States District Court for the Southern District of Georgia, pursuant to 42 U.S.C. § 1983, claiming that UHS's relationship with RCHA implicated state action. In her complaint, Willis alleged: (1) UHS's actions infringed upon her right of free speech as guaranteed under the First and Fourteenth Amendments; and (2) UHS's

actions deprived her of a property interest protected under the Fourteenth Amendment. UHS moved for summary judgment contending that: (1) its decision to fire Willis was not state action under 42 U.S.C. § 1983; (2) its termination of Willis did not deprive her of rights secured under the Constitution or laws of the United States; and (3) its employment of Willis provided only a privilege and not a property right entitled to protection under the Due Process Clause of the Fourteenth Amendment.

The district court granted summary judgment for UHS, finding that no state action existed to support Willis's claim under 42 U.S.C. § 1983, 804 F.Supp. 1557 (1992).

ISSUES

To determine whether the district court erred in granting summary judgment, we

must decide whether UHS's termination of Willis involved state action.

STANDARD OF REVIEW

[1] On appeal, a grant of summary judgment is subject to *de novo* review. *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991). We review the evidence and all factual inferences in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *MacKenzie*, 920 F.2d at 1558.

DISCUSSION

[2-6] To obtain relief under 42 U.S.C. § 1983, Willis must show (1) that the appellees deprived her of a right secured under the Constitution or federal law and (2) that the deprivation occurred under color of state law. *Sims v. Jefferson*

Downs Racing Assoc., Inc., 778 F.2d 1068, 1076 (5th Cir. 1985) (citations omitted). "[A] private hospital is subject to the provisions of 42 U.S.C. § 1983 and the Fourteenth Amendment only if its activities are significantly affected with state involvement." *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 877 (5th Cir.), *cert. denied*, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975). Previously, this circuit set forth the three primary tests the Supreme Court has used to determine whether state action exists: (1) the public function tests; (2) the state compulsion tests; and (3) the nexus/join action test. *National Broadcasting Co., Inc. v. Communications Workers of American, AFL-CIO*, 860 F.2d 0122, 1026 (11th Cir. 1988).[3] The public

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[3] This circuit has noted that these three primary tests apply in cases where a (continued...)

function test limits state action to instances where private actors are performing functions "traditionally the exclusive prerogative of the state." *NBC*, 860 F.2d at 1026 (citations omitted). The state compulsion test limits state action to instances where the government "has coerced or at least significantly encouraged the action alleged to violate the Constitution." *NBC*, 860 F.2d at 1026 (citations omitted). The nexus/joint action test applies where "the state has so far insinuated itself into a position of interdependent with the [private party] that it was a joint participant in the enterprise." *NBC*, 860 F.2d at 1026-27 (citations omitted). We must determine on a case-by-case basis whether sufficient

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[3](...continued)
party seeks to hold a private actor liable under the state action doctrine. *NBC*, 860 F.2d at 1025 n. 4.

state action is present from a non-state actor (defendant) to sustain a section 1983 claim. *Bailey v. McCann, 550 F.2d 1016, 1018 (5th Cir. 1977).*

Willis contends that she satisfies each of the three primary tests. After reviewing the record, however, we conclude that Willis fails to satisfy the first two tests. UHS did not exercise powers traditionally reserved exclusively to the state, nor did RCHA coerce or encourage UHS to fire Willis. Hence, we only address whether Willis has shown that UHS and RCHA are so intertwined in a "symbiotic relationship" that they satisfy the nexus/joint action test, thereby demonstrating the existence of state action.

Both parties cite persuasive authority from other circuits to support their

contentions.[4] Although each "intertwining" case must be decided on its unique facts, our own former Fifth Circuit has adequately addressed the issue we face in *Greco* on similar facts, and we are persuaded to follow it.[5]

In *Greco*, a physician brought a 42 U.S.C. § 1983 action against the Orange Memorial Hospital Corporation, a private hospital corporation that operated a hospital in a publicly owned building leased from Orange county, alleging that the hospital's policy prohibiting nontherapeutic abortions was

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[4] Willis cites *Jatoi v. Hurst-Euless-Bedford Hosp. Authority*, 807 F.2d 1214 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987); UHS cites *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984).

[5] According to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

unconstitutional. The evidence demonstrated that the county owned the land and build the building which housed the hospital. The private hospital corporation leased the land and hospital form the county for one dollar per year and was bound under the provisions of the lease to operate the hospital as a nonprofit institution and to furnish general public medical and surgical care. The lease required the private corporation to submit annual audits to the county and to furnish the county with any information which it felt necessary to inform the citizens about the operation and financial condition of the hospital. *Greco*, 513 F.2d at 876.

The Fifth Circuit concluded that the physician failed to establish state action for purposes of 42 U.S.C. § 1983 because "Orange County is not sufficiently

connected with the Orange Memorial Hospital Corporation's activities to imbue those actions with the attributes of the state." *Greco*, 513 F.2d at 882. Specifically, the court found that the private hospital corporation "is ultimately responsible for the daily maintenance, upkeep, and operation of the facility." *Greco*, 513 F.2d at 880. Additionally, the court found that the private hospital corporation must "maintain and operate the hospital at its own expense and ... hold the lessor harmless from any liability incurred in operating the facility ... and provide adequate insurance." *Greco*, 513 F.2d at 880. Moreover, the court found that no direct benefits accrued to Orange County; rather, only indirect benefits accrued to Orange County due to the private hospital corporation relieving the county of the

expense and responsibility of operating the hospital. *Greco*, 513 F.2d at 880. Finally, the court found that even though the lease obligates the private hospital corporation "to serve the general public, to admit indigent patients, to abide by the provisions of the Hospital Survey and Construction Act, to provide the county auditor with the yearly financial report (and any other information requested), and to obtain county approval before disposing of hospital authority," no state action existed. *Greco*, 513 F.2d at 881.

[7] Similarly, in this case, the lease obligates UHS to serve the general public, including indigent patients, and to provide the auditor with a financial report. Most importantly, however, the lease relinquishes RCHA of all liabilities, give UHS sole discretion to hire and fire employees, provides that UHS

is the governing body of University Hospital and medical staff, mandates that UHS maintain and repair the leased property at its own expense, requires UHS to maintain insurance, confers upon UHS the right and authority to make and enforce rules and regulations and safety considerations, and demands that UHS hold RCHA harmless from any court action. Thus UHS and RCHA are not so intertwined in a symbiotic relationship as to satisfy the nexus/joint action test.[6] Additionally, the Georgia Supreme Court has previously determined that RCHA and UHS are separate

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[6] The district court previously addressed this issue in *Coleman v. University Hospital*, No. CV 187-177 (S.D.Ga. Apr. 28, 1988). The court did not find a nexus between the state, in the form of RCHA, and the termination of a UHS employee for section 1983 purposes because UHS, though "not entirely free of any vestige of state supervision," had "sole and exclusive control over personnel decisions" under the terms of the lease agreement between UHS and RCHA. *Coleman*, slip op. at 3.

and distinct entities in the eyes of the law, despite some overlapping personnel at the highest level. *Richmond County Hosp. Authority*, 336 S.E.2d at 565. Hence, we hold that Willis has failed to show that state action existed.

Accordingly, we affirm the district court's grant of summary judgment for UHS.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-8763

CAROL H. WILLIS,

PLAINTIFF-APPELLANT,

v.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital,

DEFENDANTS-APPELLEES.

Appeal from the United States
District Court for the Southern
District of Georgia

Filed: June 22, 1993

JUDGMENT

Before KRAVITCH and HATCHETT, Circuit Judge, and ATKINS*, Senior District Judge.

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for hte [sic] Southern District of Florida, sitting by designation.

Entered: June 22, 1993
For the Court: Miguel J. Cortez, Clerk

By: /S/ Matt Dandson
Deputy Clerk

ISSUED AS MANDATE: AUG 20 1993

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
AUGUSTA DIVISION

CASE NO. CV 190-317

CAROL H. WILLIS,

PLAINTIFF,
v.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital,

DEFENDANTS.

Entered: July 27, 1992

ORDER

Before the Court is Defendants' Motion for Summary Judgment in this action brought by Plaintiff under 42 U.S.C. § 1983.

I. BACKGROUND

Plaintiff Carol Willis was employed as a Registered Nurse by Defendant University Health Services (UHS) at University Hospital in Augusta, Georgia, from December 1987 until January 2, 1990.

During 1989 and January 1990, Plaintiff also taught private childbirth education classes to prospective parents in Augusta. In October 1990 the *Augusta Chronicle* published a letter to the editor, written by Plaintiff, in which she expressed opinions regarding obstetrical practices.[1]

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[1] The text of the published letter, which was captioned in the newspaper as "Offers criticisms of doctors and mothers" was as follows:

> Praise goes to the very few obstetricians in Augusta who realize an educated, aware, responsible woman is an easier patient and must less of a legal risk.
>
> Shame on the multitude of obstetricians who patronizingly tells moms (in words and actions) "Don't worry about a thing, I'll take care of

(continued...)

On January 2, 1990, UHS fired Ms. Willis for the stated reason of "loss of confidence [in Ms. Willis] due to [her] poor judgment." The termination notice was signed as approved by Defendants Hicks,[2] Goforth,[3] Bowcutt,[4] and Herzberg.[5]

Plaintiff subsequently filed suit under 42 U.S.C. § 1983, alleging that Defendants

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[1](...continued)
everything for you." No wonder they get suet so often.

Sympathy goes to the gullible moms whose babies "sucked out, dragged out, or cut out" instead of them being assisted to "give birth."

Pity on the baby who pays the price with the potential of his life.

Forgive us, nature, for our lack of faith in you.

[2] Defendant Hicks was employed as a Head Nurse at University Hospital.

[3] Defendant Goforth was employed at University Hospital.

[4] Defendant Bowcutt was employed as Assistant Administrator, Nursing Services, at University Hospital.

[5] Defendant Herzberg was employed as Director of Personnel Services for University Hospital.

UHS, Hicks, Goforth, Bowcutt, and Herzberg infringed Plaintiff's right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution by terminating her employment in retaliation for her espousal and expression of her beliefs in the letter to the editor and in her private childbirth classes. Plaintiff also alleged that the termination procedure resulting in denial of her due process rights in violation of the Fourteenth Amendment.

Defendants moved for summary judgment on the alternative grounds that (1) the decisions by UHS to fire Ms. Willis as not "state action" for purposes of a § 1983 claim; (2) UHS's action in firing Ms. Willis did not deprive her of rights secured by the Constitution or laws of the Untied States; and (3) Ms. Willis's employment at UHS was a privilege and not

a property right entitled to protection of the due process clause of the Fourteenth Amendment to the United States Constitution.

II. ANALYSIS

A. The Requirements for Summary Judgment

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that there is no genuine dispute as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Clemons v. Dougherty County*, 684 F.2d 1365, 1368 (11th Cir. 1982). The party moving for summary judgment may meet this burden upon showing that the adverse party has failed to make a showing sufficient to establish the existence of

an element essential to the adverse party's case, and on which the adverse party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If any factual issue is unresolved by the motion for summary judgment, then the Court may not decide that matter. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

The court must resolve all reasonable doubts in favor of the adverse party. *Casey Enterprises, Inc. v. American Hardware Mutual Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). When, however, the moving party's motion for summary judgment pierces the pleadings, the burden then shifts to the adverse party to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The adverse party cannot

carry this burden by reliance on the pleadings, or by repetition of conclusory allegations contained in the complaint. *Morris v. Ross*, 663 F.2d 1032. 1033 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982). Rather, the adverse party must respond by affidavits or as otherwise provided in Fed. R. Civ. P. 56.

The Clerk has given the adverse party notice of the motion for summary judgment, the right to file affidavits or other materials in opposition to the motion, and of the consequences of default. *See Griffith v. Wainwright*, 772 F.2d 822 (11th Cir. 1985). Thus, the notice requirement of *Griffith* is satisfied. The parties having submitted any desired responses and materials in support thereof, I will now rule upon the motion.

B. State Action Under 42 U.S.C. § 1983

Defendants initially argue that there was no state action present when UHS fired Ms. Willis, and that therefore Ms. Willis's § 1983 claims against them must fail as a matter of law.

To be entitled to relief under § 1983, the plaintiff must show that the defendants deprived her of a right secured to her by the Constitution or federal law and that the deprivation occurred under color of state law. *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir. 1980). "'[P]rivate conduct is fairly attributable [to state action] only when the state has an affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance.'" *National Broadcasting Co. v. Communications Workers of Am.*, 860 F.2d 1922, 1925 n.4 (11th Cir. 1988) (emphasis

added). The acts of a private entity may be deemed to be state acts where: (1) there is a sufficiently close nexus between the State and the challenged action; (2) the state has so coerced or encouraged a private act that it must be considered the act of the state; or (3) the private entity exercises powers traditionally reserved exclusively to the state. *Blum v. Yaretsky*, 457 U.S. 991 (1982).[6] The determination of whether there is sufficient state action by a non-state defendant to sustain a § 1983 claim must be made on a case-by-case basis. *Bailey v. McCann*, 550 F.2d 1016, 1018 (5th Cir. 1977).

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[6] "While specifically the *Blum* court spoke of holding the state liable pursuant to state action doctrine, the standard remains constant when a party seeks to hold a private actor liable under the state action doctrine." *National Broadcasting Company v. Communications Workers of Am.*, 860 F.2d 1022, 1025 n.4 (11th Cir. 1988).

Defendant UHS is a private, non-profit corporation that operates University Hospital pursuant to a lease agreement with Richmond County Hospital Authority (RCHA). RCHA is a public hospital authority "created ... by resolution of the Board of Commissioners of Richmond County, pursuant to the Hospital Authorities Act...." *Richmond County Hosp. Auth. v. Richmond County*, 336 S.E.2d 562, 563 (Ga. 1985). As such, RCHA's acts would be state acts for purposes of § 1983 liability. *See Wofford v. Glynn Brunswick Mem. Hosp.*, 864 F.2d 117, 118 (11th Cir. 1989).

The precise question here is whether state action was present when UHS terminated an employee. This is not the first time the Court has addressed this issue. In *Coleman v. University Hosp.*, No. CV187-117 (S.D.Ga. Apr. 28, 1988),

this Court held that there was no nexus between the state in the form of RCHA and the termination of a UHS employee for purposes of a § 1983 action, because UHS as a private non-profit corporation, while "not entirely free of any vestige of state supervision," had "sole and exclusive control over personnel decisions" under the terms of the lease agreement between UHS and RCHA. *Id.*, slip op. at 3. On this basis, the Court granted summary judgment for defendant UHS. UHS, of course, now cites *Coleman* in support of its motion for summary judgment here.

In attempting to withstand this motion, Willis seeks to distinguish *Coleman* by asserting that the *pro se* plaintiff there pointed only to receipt of federal funds as a state connection; for that reason, Willis argues, the *Coleman* plaintiff could not withstand summary judgment. Willis

submits additional evidence of relationships between RCHA and UHS in support of her position that the acts of UHS are state acts.

There remains no dispute, however, that the lease agreement between RCHA and UHS grants UHS the discretion to "hire, terminate, promote or assign employees and to hire agents or independent contractors." On this point, *Greco v. Orange Mem. Hosp. Corp.*, 513 F.2d 873 (5th Cir. 1975), *cert. denied*, 423 U.S. 1000 (1975), is instructive. In *Greco*, the plaintiff brought a § 1983 action against a private corporation that operated a hospital in a publicly-owned building leased from the county, alleging that the hospital's policy prohibiting non-therapeutic abortions was unconstitutional. There was evidence that, *inter alia*, the county built the

building and owned the land and building which housed the hospital; the private hospital corporation leased the land and hospital from the county for one dollar per year and was bound under the provisions of the lease to operate the hospital as a non-profit institution and to furnish the general public medical and surgical care; and the lease required the private corporation to submit annual audits to the county and to furnish the county with any information which it felt necessary to inform the citizens about the operation financial conditions of the institution. *Id.* at 876.

Nevertheless, the Fifth Circuit affirmed the district court's dismissal on the basis that the plaintiff failed to establish state action for purposes of § 1983. The private, non-profit hospital corporation was not a state actor as to

conduct of medical policy that prohibited elective abortions where the hospital's board of directors had exclusive control of that policy under the terms of a lease agreement, and neither the county nor state had sought to regulate or influence that policy and had remained neutral with respect to implementation of that policy. *Id.* at 880-81. "The involvement of the County [was] not sufficiently related to [implementation of the hospital's medical policy] to justify the imposition of Constitutional restrictions upon the daily business of the hospital." *Id.* at 882.

Greco is applicable to the circumstances here; the critical fact remains that under the lease agreement, UHS has exclusive control over personnel management. Furthermore, the Georgia Supreme Court determined in *Richmond County Hosp. Auth., supra*, that RCHA and

UHS are separate and distinct entities in the eyes of the law, despite some overlapping personnel at the highest level. *Richmond County Hosp. Auth.*, 335 S.E.2d at 565. There is no sufficient nexus between the state and the determination by UHS to fire Ms. Willis. Furthermore, the state in the form of RCHA did not coerce or encourage UHS to fire Ms. Willis. Finally, UHS as a private hospital corporation does not exercise powers traditionally reserved exclusively to the state. *See Greco*, 513 F.2d at 882.

CONCLUSION

As in *Coleman v. University Hosp.*, No. CV187-117 (S.D.Ga. Apr. 28. 1988), there was no state action present here in Defendant UHS's termination of a UHS employee. It follows that there was no state action by individual UHS employee

Defendants who participated in that decision or its implementation.

Accordingly, Defendants' motion for Summary Judgment is **GRANTED**. The Clerk of Court is directed to enter judgment in favor or all Defendants, tax costs against the Plaintiffs, and close the case.

ORDER ENTERED at Augusta, Georgia, this 27th day of July, 1992.

/S/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
AUGUSTA DIVISION

CASE NO. CV 190-317

CAROL H. WILLIS,

PLAINTIFF,

v.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; **MARY LYNN GOFORTH,** individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; **MARILYN BOWCUTT,** individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and **JOSEPH W. HERZBERG,** individually and in his official capacity as Director of Personnel Services for University Hospital,

DEFENDANTS.

Entered: July 28, 1992

JUDGMENT

This action came on for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order of this court of July 27, 1992, Judgment is hereby entered in favor of all Defendants. Costs to be taxed against the Plaintiff.

This 28th day of July, 1992.

HENRY R. CRUMLEY, JR., CLERK

By /S/ Brenda McCarthy
Deputy Clerk

APPENDIX E

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbus shall be considered to be a statute of the District of Columbia.

No. 93-440

Supreme Court, U.S.
F I L E D
OCT 20 1993
THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CAROL H. WILLIS,

Petitioner,

vs.

UNIVERSITY HEALTH SERVICES, INC., d/b/a UNIVERSITY HOSPITAL; SHERRY HICKS, individually and in her official capacity as Head Nurse of Postpartum for University Hospital; MARY LYNN GOFORTH, individually and in her official capacity as Director of Maternal/Child Nursing for University Hospital; MARILYN BOWCUTT, individually and in her official capacity as Assistant Administrator of Nursing Services for University Hospital; and JOSEPH W. HERZBERG, individually and in his official capacity as Director of Personnel Services for University Hospital,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Carol Willis filed this action against defendant University Health Services, Inc., a private, non-profit corporation, as well as four (4) employees, both in their individual and official capacities (hereinafter "respondents") on December 28, 1990 in the United States District Court for the Southern District of Georgia. Petitioner brought this lawsuit pursuant to 42 U.S.C. § 1983, alleging that respondents' decision to terminate her employment violated her rights under the First and Fourteenth Amendments to the United States Constitution.

On August 8, 1991, respondents filed a motion for summary judgment on the grounds that Willis failed to establish that she had been deprived of a federally protected right "under color of state law" as required by 42 U.S.C. § 1983 and on the alternate grounds that Willis cannot establish any violation of her federally protected rights. The District Court heard oral arguments on the motion for summary judgment, and on July 27, 1992, entered an order granting UHS's motion holding that petitioner failed to establish state action since the state had not played any role in the decision to terminate her employment. The District Court did not reach the First and Fourteenth Amendment issues contained in UHS's motion for summary judgment. The District Court entered judgment in favor of all defendants on July 28, 1992. Petitioner filed her notice of appeal on August 3, 1992. The Eleventh Circuit affirmed the District Court by opinion, dated June 22, 1993, which holds that the petitioner failed to establish state action under any of the three tests previously recognized by this Court.

Respondent UHS employed petitioner as a registered nurse at University Hospital in Augusta, Georgia from December 1987 until January 2, 1990. The respondents' decision to terminate petitioner's employment was based on a loss of confidence due to poor judgment as exhibited by several incidents of conflict

between petitioner's practices and hospital policies.[1]

The petition is conspicuously void of the numerous facts existing in this case which were critical to the Eleventh Circuit's state action analysis. In 1984, respondent UHS was organized for the primary purpose of managing and operating University Hospital. The intended purpose of the restructuring was to enable the hospital to become more competitive in the marketplace by placing the operation of the hospital in the hands of a private, non-governmental entity which would allow the hospital to expand its operations outside of Richmond County.

Respondent UHS shares a common parent corporation, named University Health, Inc., with two other affiliated corporations named University Extended Services, Inc. and University Health Resources, Inc. The affiliated corporation named University Health Resources, Inc. is a for profit corporation which provides

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1. The Eleventh Circuit's opinion is attached as Appendix A to the petition and its statement of the facts is a far more accurate account than that set forth in the petition. In addition to the newspaper editorial, quoted in the Eleventh Circuit's opinion, there were at least four other incidents where petitioner's conduct was contrary to hospital policies. This included one situation where a former student of petitioner's Bradley Natural Childbirth Classes, named June Edwards, advised hospital personnel of numerous statements which she contended were made by petitioner, that caused respondents great concern. Mrs. Edwards was a high risk pregnancy patient, and during these classes, petitioner allegedly gave her advice which could have been life-threatening, such as the following: to wait until her contractions were sixty seconds apart for at least two hours to decrease the likelihood of a C-section; that certain obstetricians were not informed regarding natural childbirth and did not know what was best for their patients; that IVs and monitors were not necessary and that students should stay at home as long as possible since the worst thing that could happen would be a home delivery.

Since the District Court's decision and the appeal turn on other facts, respondents have chosen not to discuss these incidents in greater detail.

contract laundry services as well as an answering service for physicians. The affiliated corporation named University Extended Services, Inc. has constructed and now operates two nursing homes.

In addition to operating the hospital, respondent UHS has also entered into a joint venture with St. Joseph, another local hospital, to develop Walton Rehabilitation Hospital and a life care community called Brandon Wilde. The two nursing homes, the life care community center and the laundry service were all constructed after UHS assumed the operations of University Hospital.

Respondent UHS, a private, non-profit corporation, operates University Hospital and its related facilities through a lease agreement executed between UHS and the Richmond County Hospital Authority ("RCHA"), on December 14, 1984. Pursuant to this lease agreement, UHS was given sole discretion to hire, terminate, promote or assign employees and to hire agents and independent contractors. The lease agreement also gives UHS broad authority to determine hospital operations and services in compliance with the goal of benefiting the public health needs of the community. Paragraph 12 of the lease clearly sets forth the relationship between RCHA, UHS and the employees of UHS and states, in pertinent part, the following:

> UHS shall have the discretion to hire, terminate, promote or assign employees and to hire agents or independent contractors. UHS shall also have the discretion to determine and to adjust salaries and employee benefits.

As Mr. Bray, the President of respondent UHS, has stated in his affidavit,

> No director, officer, agent or employee of RCHA, while working in such capacity, had any right whatsoever to exercise any control over the employment or termination of Carol H. Willis. Furthermore, no director, officer, agent or employee of RCHA, while acting in such capacity, exercised or attempted to exercise control or discretion over the employment or termination of Carol H. Willis.

In addition to giving respondent UHS the exclusive authority to make personnel decisions, the lease also gives UHS exclusive control over the management and operations of the hospital. UHS was given the power to diminish, curtail or cease services when it determined that such cessation will promote the public health needs of the community. UHS is also authorized to "augment, improve or increase any existing service, or add any service or shift current or new services to another facility. . ." In addition, respondent UHS has the authority to determine whether any acquisition, construction, or improvement of hospital facilities is necessary. UHS has "complete discretion" in deciding whether or not to repair or replace any asset which may become worn, inoperable or obsolete. The lease also authorizes respondent UHS to obtain policies of insurance such as business interruption insurance, which are payable solely to UHS. UHS has the authority to promulgate and enforce its own rules and regulations regarding safety, care and cleanliness of the leased premises.

UHS receives county funds to be used to offset operating costs and therefore, must disclose financial information to RCHA in connection with the hospital authority's oversight responsibility. However, UHS does not have a working relationship with RCHA in terms of UHS's operation of University Hospital. The quarterly meetings and business of RCHA and UHS are conducted separately through separate agendas.

Shortly after University Hospital's restructuring, the highest state court in Georgia was asked to analyze the relationship between RCHA and respondent UHS. *See Richmond County Hospital Authority v. Richmond County,* 255 Ga. 183, 336 S.E. 2d 562, 565 (1985). Applying Georgia's alter ego law, the Georgia Supreme Court held that RCHA and UHS are separate and distinct entities. *Id.*

Based upon these facts, the Eleventh Circuit, on June 22, 1993, affirmed in all respects the District Court's order granting respondents' motion for summary judgment. *Carol H. Willis v. University Health Services, Inc., d/b/a University Hospital, et al.,* 993 F.2d 837 (11th Cir. 1993).[2] The petitioner did not file a petition for reconsideration with the Eleventh Circuit, but instead filed her petition to this Court.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT PROPERLY APPLIED ALL OF THE STATE ACTION TESTS WHICH HAVE BEEN PREVIOUSLY RECOGNIZED BY THIS COURT.

Under 42 U.S.C. § 1983, the civil rights plaintiff must establish that the alleged violation of her federally protected rights was committed under color of state law. *See* 42 U.S.C. § 1983. Underscoring the primary focus of a federal court in determining whether state action exists, this Court recently reaffirmed its prior holdings and stated, "[m]ost fundamentally, this court has held that a government 'normally can be held responsible for a private

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2. The facts of this case contradict the factual assumptions made by petitioner in the first question presented to this Court and this question certainly does not merit Supreme Court review.

decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].' " *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982); *Flag Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 357 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)). Although the language cited above from the *Blum* Court spoke of holding the state liable pursuant to the state action doctrine, the standard remains the same when a party seeks to hold a private actor liable under the state action doctrine. Indeed, in *San Francisco*, this Court applied the *Blum* language to a civil rights claim directed against the United States Olympic Committee, a private corporation. *San Francisco*, 483 U.S. at 543.

This Court, as well as the Eleventh Circuit, has previously recognized that there are three primary tests which apply in cases where a party seeks to hold a private actor liable under the state action doctrine: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. *See San Francisco*, 483 U.S. 522; and *NBC v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988). Through the second question presented, petitioner argues that the Eleventh Circuit below erred by refusing to apply a fourth test which she refers to as the "symbiotic relationship" test announced in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Petitioner maintains that the "symbiotic relationship" test is separate and apart from the nexus/joint action test applied by the Eleventh Circuit below. This argument is contrary to recent Supreme Court and Eleventh Circuit case law. This authority

indicates that the nexus/joint action and symbiotic relationship tests are one and the same. *San Francisco*, 483 U.S. at 547, n. 29; and *NBC*, 860 F.2d at 1026, n. 5. Addressing this issue, the Eleventh Circuit recently stated the following:

> *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939, 102 S. Ct. 2744, 2754-55, 73 L. Ed. 2d 482 (1982) separated the nexus and joint action tests, but a more recent Supreme Court case has merged the two. *See San Francisco*, __ U.S. at __ n. 29, 107 S. Ct. at 2986 n. 29. *See also, Jackson*, 419 U.S. at 357-58, 95 S. Ct. at 456-57.

NBC, 860 F.2d at 1026, n. 5.

Consistent with *San Francisco*, the opinion below clearly indicates that the Eleventh Circuit applied the "symbiotic relationship" analysis described in *Burton* to the facts of this case in determining whether petitioner met the nexus/joint action test:

> Hence, we only address whether Willis has shown that UHS and RCHA are so intertwined in a "symbiotic relationship" that they satisfy the nexus/joint action test, thereby demonstrating the existence of state action.

(Petition, App. A, p. 13a). The Eleventh Circuit performed an extensive factual analysis of the relationship between RCHA and respondent UHS and held that petitioner failed to satisfy the nexus/joint action test. (Petition, App. A, pp. 18a-19a). Petitioner's argument that the courts below failed to properly apply the correct state action tests is without merit.

The Eleventh Circuit also correctly held that petitioner failed

to meet the remaining two state action tests.[3] First, petitioner could not establish state action under the public function test since respondents did not exercise powers traditionally reserved for the state. (Petition, App. A, p. 13a). *See also, Rendell-Baker*, 457 U.S. at 842; and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). Secondly, petitioner did not satisfy the state compulsion test since RCHA did not coerce or encourage respondents to terminate petitioner's employment. (Petition, App. A, p. 13a). *See also, San Francisco,* 483 U.S. at 547; and *Blum*, 457 U.S. at 1004. Accordingly, the Eleventh Circuit correctly applied all of the state action tests established by the precedent case law of this Court.

II.

THE DISTRICT COURT AND THE ELEVENTH CIRCUIT PROPERLY CONSIDERED ALL OF THE PARTICULAR FACTS OF THIS CASE AND FOUND STATE ACTION TO BE LACKING.

Petitioner is requesting that this Court re-examine the particular facts of this case which have been thoroughly analyzed by the two courts below. As stated in the *Burton* opinion, upon which petitioner relies, "only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. The court below applied the sifting factual analysis required by *Burton*, but unlike *Burton*, found that state action was lacking in this case.

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3. Petitioner's questions presented numbers four and five clearly do not merit review by this Court. An abundance of case law precedent from this Court has definitively dealt with these issues. In fact, during oral argument before the Eleventh Circuit, counsel for petitioner abandoned her arguments under these two tests.

In particular, the Eleventh Circuit recognized that the following facts demonstrate that UHS and RCHA are separate and distinct entities serving different purposes: (1) UHS assumed control of the hospital so that it could be competitive outside of Richmond County; (2) University Health, Inc. is the parent corporation for UHS and other services; (3) UHS has entered into a joint venture with the local hospital to develop other care facilities; (4) UHS has broad discretion to diminish, curtail or cease services to promote the public health needs of the community; (5) UHS is authorized to "augment, improve or increase any existing services or add any service or shift current or new services to another facility"; (6) UHS has authority to determine whether acquisition, construction, or improvement of hospital facilities is necessary; (7) UHS has sole authority to repair or replace any of its assets; (8) UHS may obtain insurance policies payable solely to UHS; (9) UHS has the authority to enforce rules and regulations regarding safety and care; and (10) UHS controls the daily operations and management of the hospital. (Petition, App. A, pp. 7a-8a).

Moreover, in concluding that respondents' decision to terminate petitioner's employment did not constitute state action, the Eleventh Circuit stressed the following factors:

> Most importantly, however, the lease relinquishes RCHA of all liabilities, gives UHS sole discretion to hire and fire employees, provides that UHS is the governing body of University Hospital and medical staff, mandates that UHS maintain and repair the leased property at its own expense, requires UHS to maintain insurance, confers upon UHS the right and authority to make and enforce rules and regulations and safety considerations, and demands that UHS hold RCHA harmless from any court action. Thus,

> UHS and RCHA are not so intertwined in a symbiotic relationship as to satisfy the nexus/ joint action test.

(Petition, App. A, pp. 17a-18a).

Accordingly, petitioner's argument that UHS is merely a legal fiction of RCHA is unconvincing. Although RCHA has some concomitant oversight responsibilities in connection with the funding it gives to support hospital operations, the day to day management and operation of University Hospital is performed by UHS, a private corporation.

Since, as recognized by the Eleventh Circuit, RCHA and UHS are separate and distinct entities, the petitioner's arguments that it is unfair to recognize the private nature of UHS must also fail. Petitioner's suggestions that RCHA reorganized and placed the operations of University Hospital in UHS's control merely to avoid liability for wrongful termination claims is simply unsubstantiated by any evidence. As recognized by the Eleventh Circuit, the evidence in the record for this case shows that the purpose of the restructuring was to allow University Hospital to increase its service area and compete with other private medical providers outside of Richmond County. (Petition, App. A, p. 7a).

In question presented number three, petitioner, relying on selective facts, also argues that the Court should grant certiorari in this case due to a "conflict among the circuits" in applying the "symbiotic relationship" test of *Burton* to other cases. *See Greco v. Orange Memorial Hospital*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984); *Jatoi v. Hurst-Euless-Bedford Hospital Authority*, 807 F.2d 1214 (5th Cir.), *modified on other grounds*, 819 F.2d 545 (5th Cir. 1987); and *Milo v. Cushing Memorial Hospital*, 861 F.2d 1194 (10th Cir. 1988). The holdings of these cases are not in conflict

with one another, but, rather, involve application of the *Burton* "symbiotic relationship" analysis to a variety of factual contexts. The Eleventh Circuit below analyzed the factual and legal analysis of these cases and held that the Fifth Circuit's decision in *Greco* was the correct application of *Burton*'s symbiotic relationship test to facts similar to those found in this case. Petitioner's contention that the application of the *Burton* "symbiotic relationship" analysis to these previous cases merits review is merely an additional effort to have this Court sift through the factual scenario of this case which has twice been thoroughly examined by the courts below.

Furthermore, to the extent that any conflict may be deemed to exist between the application of the "symbiotic relationship" test to the particular facts of these cases, such conflict does not justify review in this case. The Eleventh Circuit's ruling under consideration is consistent with the most recent decisions of this Court discussing the application of *Burton*'s "symbiotic relationship" test. In *San Francisco*, 483 U.S. at 547, n. 29, this Court indicated that even under the *Burton* test relied upon by petitioner, the intertwining connections between the state and the private entity which form the "symbiotic relationship" must somehow involve the alleged constitutional violation. *Id.; see also, NBC,* 860 F.2d at 1027. The evidence in this case convincingly demonstrates that the connections between RCHA and respondent UHS, relied upon by petitioner, were not involved with nor did they influence the respondents' decision to discharge petitioner. The Eleventh Circuit correctly concluded that, based upon the facts of this case, state action is not present and the Eleventh Circuit's determination in this regard should not be disturbed.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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